Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of	)	MM Docket No. 88-577
	)	
LIBERTY PRODUCTIONS, A LIMITED PARTNERSHIP	)	File No. BPH-870831MI
	)	
WILLSYR COMMUNICATIONS LIMITED PARTNERSHIP	)	File No. BPH-870831MJ
	)	
BILTMORE FOREST BROADCASTING FM, INC.	)	File No. BPH-870831MK
	)	
SKYLAND BROADCASTING COMPANY	)	File No. BPH-870831ML
	)	
ORION COMMUNICATIONS LIMITED	)	File No. BPH-870901ME
	)	
For a Construction Permit for a New FM Broadcast Station on Channel 243A at Biltmore Forest, North Carolina	)	

To: The Commission

BFBFM'S REPLY TO ENFORCEMENT BUREAU'S COMMENTS

Date: February 29, 2000

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SUMMARY

The Enforcement Bureau's analysis is flawed in three key respects. First, the Bureau would have the Commission ignore its own published rules and public notices regarding required certifications, deferring instead to a secret practice engaged in by the Bureau in contravention of the policy set forth in the rules. For an agency to ignore its own rule is, of course, unlawful. Moreover, even under the secret practice now revealed by the Bureau, Liberty's application should have been required to include a family mass media certification. Because the defect is not correctable after the filing deadline, Liberty's application must be dismissed.

Second, in interpreting the applicability of the new entrant rules to debt and equity holders in an applicant, the Bureau ignored the Commission's stated intent in adopting the debt/equity rule. Instead, the Bureau incorrectly assumed that equity and debt must be zero-summed to apply the rule, creating anomalous situations where controlling owners of applicants would not have any of their other broadcast stations attributed to them. The correct interpretation measures both debt and equity against the total asset value of the applicant.

Third, the Bureau concedes that Liberty should have been charged with the media interests of Cumulus Broadcasting, its major investor and one of the largest broadcast station owners in America. However, to do so now would not only be an impermissible major amendment necessitating the dismissal of the Liberty application, but, under several directly apposite precedents, would undermine the integrity of the auction.

I. Introduction

As authorized by the Assistant General Counsel's Order of January 14, 2000, Biltmore Forest Broadcasting FM, Inc. ("BFBFM") hereby submits its reply to the Enforcement Bureau's Comments on the various pleadings which are currently pending against Liberty Productions, L.P. ("Liberty"). Although the Bureau acknowledges that Liberty failed to provide a certification required by the rules, failed to disclose the media interests held by its limited partner, improperly claimed new entrant status while having an attributable connection with a major broadcast owner, and did not actually have a site available when it certified that it did, the Bureau believes that Liberty should be excused from its various malefactions and merely be required to cough up the non-discounted price of the station. The Bureau's astonishingly forgiving attitude unfortunately corroborates the cynical common wisdom: that the FCC will excuse *any* misconduct by an auction winner in order to get its hands on the auction proceeds, even when the very same applicant had previously been disqualified on multiple grounds by the Commission with no change whatsoever in the underlying facts. If this is to be the rule, the Commission should formally revoke its Character Policy Statement and its historical pronouncements on the critical importance of truthfulness to the agency. Everyone should understand up front that winning an auction absolves all sins, all rule violations, and all defects in an application. If this is the rule, let there be no pretense otherwise. If it is not the rule, Liberty's application should be dismissed. At a minimum, the Bureau's waffling on the rules so taints the conduct of the auction that it would be grossly unfair to let the results stand.

II. Liberty's Omission of a Required Certification Cannot Be Excused

The Bureau recognizes, as it must, that Liberty did not include in its short-form application the certification regarding the media interests of immediate family members which the pre-auction public notices and, hence, the rules, expressly required. The inclusion of these few basic certifications was deemed so important that the Commission would not even permit applicants to correct their omission by a subsequent amendment. Despite a plethora of public notices reminding applicants about the importance of having complete and accurate applications and the fatal consequences of failure to submit the required information, we are now told by the Bureau that those public notices were just a joke. The Commission did not at all mean what it repeatedly said. We are now told for the first time that the "practice" of the Mass Media Bureau was to require such certifications "only when it appeared that immediate family members actually had media interests that could be attributable to the bidder." Bureau Comments at 11.

This disclosure by the Bureau is nothing short of astounding in its implications. First, how was there a "practice" for the Bureau to follow in contravention of its own public notice? This was the very first – and apparently the only --auction of a mass media license in which such certifications had been required. It is incomprehensible how this new and secret "practice" could have developed between the time the Commission announced the requirement in the July 1999 Public Notice and the time the applications were submitted in August -- there weren't any intervening broadcast auctions!

Second, it is black letter administrative law that the rules applicable to one applicant must apply to them all. See Melody Music, Inc. v. FCC, 120 U.S. App. D.C. 241, 345 F.2d 730 (1965). It would be grossly violative of every principle of jurisprudence to suggest that a secret practice favoring one applicant can override the publicly stated position of the agency. The importance of abiding strictly by the rules in an auction context is something the Commission has stressed in its own filings to the courts in connection with the C Block defaults. You can't have a fair auction under circumstances in which bidders place their bids based on the assumptions and rules stated by the Commission prior to the auction, and then the winner is granted relief from the rules that applied to everybody else. For example, an auction bidder might very well bid more at an auction if it knew that initial downpayments would not be required for some lengthy time after the auction. To offer that relief to a winning bidder, for whatever reason, fundamentally cheats the other bidders. It would violate the integrity of the auction for the Commission to change *after* the auction a term of the process that was properly relied on by all the other bidders.

That is precisely what has happened here. BFBFM reviewed Liberty's application before the auction began. It recognized that Liberty had failed to supply a certification which the Commission had expressly stated was required and without which the application would be dismissed. Relying on those pronouncements, BFBFM placed its bids accordingly. At the point that Liberty was the only other bidder, BFBFM reasonably concluded that the Commission had meant what it said about the importance of the certifications and the consequences of failure to provide them, and ceased bidding

against, in effect, itself. Neither BFBFM nor any other applicant could have known that there was a secret practice which contravened everything the Commission had publicly announced about family media certifications. To permit the fundamental alteration of the rules of an auction after it is complete is so plainly unlawful and unfair that it must jeopardize every auction the Commission conducts hereafter. The Commission should defend the integrity of the auction process itself by affirming here that the stated rules of the auction will apply before and after the auction to all applicants equally. See Nextel Acquisition Corp., (MO&O), 13 FCC Rcd 11983, 11987 (WTB 1998), para. 10; Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS, 13 FCC Rcd 8345, 8348 (1998), para. 7; Two Way Radio of Carolina, Inc., 12 FCC Rcd 958 WTB, 19970, aff'd 14 FCC Rcd 12035 (1999).

Third, the secret practice apparently being followed by the Bureau is perplexing. How can the Bureau know whether there is a family member "to whom the certification might apply" unless the applicant supplies some information on the matter to the Bureau in the first place? Here Mr. Murray's equity interest in Liberty's application was correctly reported as being 65%. Not only did he not disclose his own interest in WLJQ, he obviously did not disclose his wife's 50% interest in that station, an interest which would itself have been attributable but for the bizarre interpretation which Liberty and the Bureau gave the pertinent rule. There are two points to be made here. First, it makes no sense to say that a certification will be required only when there is some reason to believe that it may be false. If the rule flatly requires a certification, it should not be up to applicants to decide whether or not they should supply it. Second, in the particular circumstances of this case, there actually were very practical reasons to believe that the

certification might be significant: Murray's wife has a media interest in a nearby market. Liberty's Opposition pleading demonstrated that Liberty had been reading the old, superseded rule in concluding that Murray did not have an attributable interest in WLJQ. Since Murray himself actually has an attributable interest in WLJQ under the current rule (73.5008), his wife's interest in that station was also attributable. Thus, even under the terms of the secret "practice" which the Bureau tells us it follows in lieu of the requirements of the Public Notice, Liberty should have been required to make the certification. It was precisely the sort of familial interest that required careful analysis and scrutiny. In other words, here the Bureau is not even following what it now claims is its consistent secret practice. We are simply in a no man's land where the rule of law and consistent application of the rules has been discarded. See State of Oregon Acting by and through the State Board of higher Education for the Benefit of Southern Oregon State College for Construction Permit For a New Noncommercial Educational FM Station on Channel 205C1 in Redding, CA, 11 FCC Rcd 1843 (1996), para. 6 ("It is a 'well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action.'"); citing Florida Institute of Technology v. FCC, 952 F.2d 549, 553 (D.C. Cir. 1992).

Finally, the Bureau notes that the family media certification was not required in a subsequent mass media auction. That obviously has no bearing whatsoever on whether Liberty did or did not comply with the announced rules applicable to *this* auction, or whether other bidders relied on those rules to their detriment. We must adjudge Liberty according to the rules that applied to it and its fellow bidders, not the rules that were apparently revised for another auction in which none of the present parties participated.

BFBFM respectfully urges the Commission to preserve the integrity of the auction process by adhering strictly to the rules which were announced prior to the auction. Not only would deviation from those rules be unlawful and unfair to the parties to the instant proceeding, but it would send a hopelessly confusing message to participants in future auctions. The failure to apply the rules strictly here would place the Commission in a quandary when future applicants fail to include this or that certification. Having established a precedent that the shibboleths of contained in the Public Notices establishing the ground rules for auctions do not really mean what they say, how could the Commission ever dismiss another application for defective certification? Since rule 1.2105(b) plainly and expressly requires the dismissal of Liberty's application, nothing more is required. Justice, equity and sound policy all suggest that Liberty's failure to provide the required certification must result in its dismissal.

III. Bureau Has Misread Section 73.5008 of the Rules.

Liberty claims that it correctly certified that Mr. Murray's 65% equity interest in Liberty was not attributable to Liberty because the combination of debt and equity in the company reduced his interest to less than 33%. That the Bureau seems to have gone along with this reading of the rule – a reading which utterly negates its utility and permits the very shenanigans which the Commission sought to preclude – is flabbergasting. Even the Bureau acknowledges that the text of the order adopting new rule 73.5008 repeatedly indicated that interests would be attributable for new entrant purposes whether they were debt or equity. Amendment of Part 73 – Bidding Credit, 14 FCC Rcd 12541 (1999),

paragraphs 7, 10. There can be no question that the Commission intended to capture both debt interests and equity interests in the new entrant net. Under basic rules of statutory construction, a rule which is ambiguous should be read to accomplish the stated purpose of adopting the rule. See Franklin Communications Partners, (MO&O), 8 FCC Rcd 4909, 4910 (1993), para. 10; New York Comm'n on Cable Television v. FCC, 571 F.2d 95, 98 (D.C. Cir. 1978). Liberty's and the Bureau's interpretation actually defeats the purpose of the rule. Interestingly, Liberty did not disclose the identity or imputed ownership interest of the person or entity which, under its own interpretation of the rules, holds a substantial chunk of its application.[1] If Liberty had felt that this person or entity held an attributable interest sufficient to knock Mr. Murray out of the picture, it should have disclosed that interest in the ownership section of its application.

Consider the situation in which the 100% controlling owner of a broadcast applicant has financed his application almost entirely through debt with only the minimal capital needed to do business being invested as "equity" capital. That situation is not uncommon at all. Under the Bureau's view, that controlling shareholder could hold licenses in a hundred other broadcast stations, have total control over the applicant entity, and yet be deemed a "new entrant" because his 100% equity would be a small fraction of the debt plus equity of the applicant. Plainly, this view is contrary to the intent of the rule. The real situation presented here is only slightly less egregious, with Mr. Murray holding 65% of the equity and a substantial interest in a nearby radio station.

[1] Since Mr. Murray holds a 65% equity share in Liberty, a person or company holding a debt interest sufficient to reduce his interest in the combined debt and equity to below 33% would have to have a very substantial debt interest indeed.

The better view is the one that not only is consistent with the language of the rule but does not gut the rule's purpose. The rule provides:

> In addition, the attributable mass media interests, if any, held by an individual with an equity and/or debt interest in a winning bidder shall be attributed to the winning bidder for purposes of determining its eligibility for the new entrant bidding credit, if the equity (including all stockholdings, whether voting or non-voting, common or preferred) and debt interest or interests, in the aggregate, exceed thirty-three (33) percent of the total asset value (defined as the aggregate of all equity plus all debt) of the winning bidder.

Section 73.5008(c).

The Bureau seems to have been under the mistaken belief that the debt interests and equity interests embraced by this rule are a mutually exclusive zero-sum game. They are not. An equity holder and a creditor can both have an interest in the same assets. The best explanation is an illustration. If an applicant had a 100% shareholder who had contributed $1,000 in capital, plus a debtor who had loaned the company $99,000, the company's "total asset value" would be $100,000. The shareholder's interest would be 100%. (The equity holder has a 100% share in the loan or whatever the loan was spent on, as well as in his or her initial capital investment). The creditor's interests in the total asset value would be 99%. The two interests do not have to add up to 100. This formulation makes perfect sense and implements the purpose of the rule. Similarly, if a 65% equity holder had contributed $65,000 to a company, and the company had borrowed an additional $100,000, the equity holder's interest would be 65% and the creditor's interest would be 60.6%. The interests of both would be attributable. Finally, if a 25% equity holder had contributed $25,000 in equity capital and $10,000 as a loan,

and a creditor had loaned the company $100,000, the interest of the equity holder would be 25% plus 12.5% (37.5%). The other creditor's interest would be 74%.

BFBFM must add one further cautionary note. In addition to effectuating both the language of the rule and the intent of the Commission, the formulation above will save the Commission a fortune. If the Bureau's formulation of the rule is adopted, any applicant in Auction 25 who had disclaimed a new entrant credit in the auction based on a straightforward reading of the rule and of the Commission's intent (as expressed in the adopting Order) could legitimately insist that it be credited with the new entrant discount based on the new liberalized reading. Not only would major refunds have to be made, but future applicants can simply arrange their financial affairs so that debts to their law firms, accountants, non-media-holding stockholders are outstanding at the time that the new entrant credit is claimed. By creating a paper debt, the media-holding principal could effectively reduce its attributable interest so as qualify for the new entrant credit while maintaining complete control of the applicant entity *and* all of its other media interests. The public will lose millions in discounts to phony "new entrants" like Liberty.

There are two consequences to all of this. First, the Commission should definitively rule that Murray's interest in WLJQ was an attributable interest which, under the new entrant rules, should have prevented Liberty from claiming a full 35% new entrant credit. Second, Liberty's concealment of Murray's interest and its affirmative, unqualified certification that it qualified for a full discount constitute a disqualifying misrepresentation.

IV. Stripping Liberty of Its Discount Is Not a Permissible Solution

The Bureau grudgingly concedes that Cumulus Broadcasting's interest in Liberty should have resulted in Liberty having no claim to a new entrant discount. BFBFM obviously agrees with that. However, the Bureau also takes the position that an auction bidder who falsely certifies that it qualifies for a full new entrant discount should, if caught in the lie, have its discount taken away and be awarded the license anyway. BFBFM in its original Motion to Enlarge Issues pointed out two critical reasons why that would be both bad policy and unlawful. First, the policy would actually encourage people to falsify their discount status. Chances are you'll never get caught, and if you do, you're just back where you would have been if you told the truth. If the IRS operated on that principle, tax evasion would be rampant, and justifiably so. More importantly, because one of the bidders has falsified its bidding status, the auction was conducted under false pretenses. The entire dynamic of the auction might have been different. For one thing, Liberty itself might not have bid as high as it did and would not have won the auction at all. Other applicants might not have bid what they bid – or might well have bid more against Liberty – if they had known that Liberty was not entitled to the discount it claimed.

The Commission has repeatedly refused to permit an applicant to change its discount status after an auction because the dynamics of the auction would have been different if the designated entity status of a bidder had been different. In Two Way Radio of Carolina, Inc., 12 FCC Rcd 958 WTB, 19970, aff'd 14 FCC Rcd 12035 (1999), the Commission was faced with an applicant who sought a post-auction increase in its

discount status based on a purported misunderstanding of the pertinent rule. The Bureau ruled:

> Bidders placed bids during the auction based on their understanding that Two Way Radio was entitled to a 10 percent bidding credit. The amount of Two Way Radio's bids may have affected the actions, bidding strategies, and bids of other bidders. The fact that there were higher bids in the markets after Two Way Radio submitted its winning bids is not dispositive that its filing status did not affect the actions of other bidders.

12 FCC Rcd at 962. Both the Bureau and the Commission recognized that the very integrity of the auction would be affected by a post-auction change in the designated entity status of an auction participant. Clearcall, Inc. 12 FCC Rcd 965 (WTB, 1997) is in accord. In other words, Liberty's false claim of an entitlement to a full discount cannot be "fixed" by simply making Liberty pay the undiscounted amount. This is, of course, over and above the problem with Liberty's failure to include a required certification, another factor which skewed the auction results. The only fair solution is to dismiss Liberty's application and award the license to the next highest bidder among the remaining applicants.

Two Way Radio and Clearcall are instructive in another important regard. Both cases hold that a change in designated entity status (i.e., a change in qualification for a discount in the auction) is not a minor amendment. Section 1.2105(b) of the rules specifically provides that major amendments to a short form may not be made after the filing deadline. Major amendments are deemed to include "...changes in an applicant's size which would affect eligibility for designated entity provisions." The Enforcement Bureau concedes that Cumulus Broadcasting's involvement in Liberty constituted a change which should have altered Liberty's designated entity status. It urges that Liberty be treated as though it had a different status than it originally claimed. Yet it does not

deal with the prohibition in 1.2105(b) against major amendments of this very type. If the Bureau is correct that Liberty must be treated as having undergone a major amendment, then its application must be dismissed, not simply charged a higher auction price.

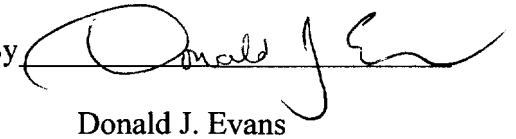
Finally, we note that the Bureau has not exercised its right to seek more information regarding the Liberty/Cumulus connection. Cumulus is a megaholder of broadcast stations, not a bank or lending institution. Liberty itself acknowledged that Cumulus's interest is so substantial that, if attributed, it would be sufficient to take away new entrant status, but it carefully provided no particulars regarding the details of its arrangement with Cumulus. Congress expressly ordained in the Balanced Budget Act[2] that only entities which were applicants prior to July 1, 1997 would be eligible to participate in the broadcast auction, and the Commission confirmed that this prohibition applied also to changes in ownership of existing applicants. First Report and Order - Competitive Bidding, 12 FCC Rcd 15920, Para. 57 (1998). Given these facts, the Commission, if it does not dismiss Liberty outright, should at least demand further particulars regarding the relationship between Liberty and Cumulus to ensure that the mandate of the statute is being carried out.

V. Conclusion

The Bureau's analysis is internally inconsistent, directly contrary to numerous Commission precedents, would create bad precedents for future auctions, and would be grossly unfair to the participants in this auction. Moreover, the Bureau simply ignored a number of key provisions of the Commission's rules. Liberty's application should either be dismissed or the requested issues added.

Respectfully submitted,

Biltmore Forest Broadcasting FM, Inc.

By 

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[2] 47 U.S.C.309(l)(2)

CERTIFICATE OF SERVICE

I, Nadia Nixon, a Secretary at the firm of Donelan, Cleary, Wood and Maser, P.C., hereby certify that the foregoing BFBFM's REPLY TO ENFORCEMENT BUREAU'S COMMENTS was mailed by first class mail, postage pre-paid, to the following persons on this ____ day of February 2000.

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